

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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|----------------------------------|---|-------------------------|
| CHERYL A. CANIFORD a/k/a | : | |
| CHERYL A. CARPENTER, | : | C.A. No. 03C-04-017 WLW |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| SAMUEL M. WILSON, M.D. and | : | |
| BAYHEALTH MEDICAL CENTER, | : | |
| INC., t/a KENT GENERAL HOSPITAL: | : | |
| | : | |
| Defendants. | : | |

Submitted: March 4, 2005
Decided: June 17, 2005

ORDER

Upon Defendants' Motion for Summary Judgment.
Granted.

Kevin M. Howard, Esquire of Young Malmberg & Howard, P.A., Dover, Delaware;
attorneys for the Plaintiff.

Diana M. Andrews, Esquire of Elzufon Austin Reardon Tarlov & Mondell, P.A.,
Wilmington, Delaware; attorneys for the Defendants.

WITHAM, R.J.

FACTS

This medical negligence action was filed on April 11, 2003. Plaintiff alleges that Defendant Samuel M. Wilson, M.D. negligently failed to reposition a subclavian intravenous line that had migrated into the left brachiocephalic vein. Plaintiff alleges that this line eroded through the vein, requiring a surgical procedure to drain the fluid. Plaintiff has also alleged (apparently for the first time in her Pretrial Stipulation on November 18, 2004), that “Dr. Wilson’s negligence prolonged [her] illness which ultimately resulted in significant damage to her left and right fallopian tubes which has left [her] with the inability to conceive a child.”

Dr. Wilson requests summary judgment on the issue of permanent damages because he contends that Plaintiff has failed to provide any expert testimony of negligence on the part of Defendant as required by 18 *Del. C.* §6853. Defendant asserts that Plaintiff’s expert, Dr. Tonwe, never even criticized Dr. Wilson’s care and Plaintiff’s second expert, Dr. Frost, alleged no permanent damage to Plaintiff. Defendant therefore requests that the Court order that Plaintiff be prohibited from presenting any evidence of additional damages not so alleged in the deposition testimony of Dr. Frost or in Dr. Frost’s expert report. Defendant is also seeking a protective order from the Court prohibiting Plaintiff from taking any more depositions. Defendant argues that discovery has been closed since October 1, 2004 and it would cause severe prejudice to Defendant to move the discovery date again.

Plaintiff argues that Dr. Robert Fry (a colorectal surgeon at Thomas Jefferson University Hospital), was identified as a treating physician of the plaintiff early in the

litigation. Plaintiff maintains that, because Dr. Fry was identified as a treating physician, Defendant should have anticipated that plaintiff would call him at trial to testify as to the surgical procedure ultimately performed on Plaintiff and the infection allegedly caused by Defendant's failure to reposition the line. Plaintiff insists it is her intention to depose Dr. Fry for the purposes of trial only, not for discovery, and she is not attempting to expand the record. Plaintiff asserts that it is her belief that Dr. Fry will testify that the delay in the surgery necessitated by Dr. Wilson's improper placement of the central IV line caused the injury to Plaintiff's fallopian tubes.

Plaintiff now requests that the Court extend the discovery period at least another three months because the trial is not scheduled to take place until October 24, 2005.

DISCUSSION

The discovery period has been closed in this case since October 1, 2004 and the trial has already been delayed a number of times. Plaintiff has asked the Court to extend the discovery date again in order to allow Plaintiff to take the deposition of Dr. Fry.

The Court has inherent power to enforce its own scheduling order.¹ The Court has already moved the discovery cut-off date twice and now, in the interest of avoiding further prejudice to the defendant, denies Plaintiff's request to change the discovery cut-off again. Plaintiff did not allege these permanent damages of

¹ See *Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1224-25 (Del. 1989); *Bell v. Wolhar*, 1999 WL 971072 (Del. Supr.); *Baker v. Rivair Flying Serv., Inc.*, 744 F.2d 1438 (10th Cir. 1984).

infertility until November 18, 2004, more than a month after the discovery cutoff set by the Court. It would be highly prejudicial to the defendant to permit the plaintiff to raise an entirely new claim of permanent damages after the third discovery cut-off date set by the Court.

Neither may the plaintiff introduce evidence of infertility through Dr. Fry, her colorectal surgeon. Plaintiff identified only Dr. Tonwe and Dr. Frost as her expert witnesses and neither Dr. Tonwe nor Dr. Frost stated that the plaintiff suffered any permanent damages relating to infertility. At no point did the plaintiff identify Dr. Fry as anything but a treating physician. While Dr. Fry may have been a fact witness, he was never identified as a testifying physician, nor was Defendant notified that Dr. Fry was going to testify about Plaintiff's alleged infertility until after the close of discovery. An expert witness is needed in a medical negligence action to establish liability, causation and damages.² Dr. Fry was never identified as an expert nor was the intended subject matter of his testimony disclosed.³

² 18 *Del. C.* §6853 provides:

No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death

See also Russell v. Kanaga, 571 A.2d 724, 732 (Del. 1990).

³ Furthermore, while the Court makes no judgment on the issue, the Court questions whether Dr. Fry, as a colorectal surgeon, would be qualified to testify as an expert on the cause of Plaintiff's alleged infertility.

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CONCLUSION

The Court has denied Plaintiff's request to extend the discovery period. Plaintiff is, therefore, prohibited from taking any additional discovery, including but not limited to the deposition of Dr. Fry. Further, it appears that the issue of the plaintiff's alleged infertility was not mentioned by Dr. Tonwe or in Dr. Frost's deposition or expert report. Therefore, no medical expert is available to testify on the issue of the plaintiff's alleged infertility. Consequently, any such claims of additional damages are prohibited by 18 *Del. C.* §6853. Defendant's Motion for Summary Judgment on additional permanent damages is granted.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File